(2018) 07 RAJ CK 0099

In the Rajasthan High Court

Case No : Special Appeal Writ No. 1523 of 2016

M/s Bharti Hexacom Limited @APPELLANT@Hash State of Rajasthan & Ors.

Date of Decision : 03-07-2018

Acts Referred:

Rajasthan Tax on Entry of Goods into Local Areas Act, 1999 — Section 34A

Citation : (2018) 07 RAJ CK 0099

Hon'ble Judges : KALPESH SATYENDRA JHAVERI, J;VIJAY KUMAR VYAS, J

Bench : Division Bench

Advocate : Sanjay Jhnawar, Nikhil Simlot, R.B. Mathur

Final Decision : Allowed

Judgement

1. By way this appeal, the appellant has challenged the judgment and order of the learned Single Judge whereby the learned Single Judge has

dismissed the writ petition.

2 The facts of the case are that the SLP No.510/2015 is pending before the Supreme Court and in the SLP filed by the petitioner challenging the

Constitutional validity of Entry Tax Act and the demand created by the respondents, the Supreme Court vide its order dated 12.1.2015 has granted

stay of 50% of the demand on condition that the balance 50% demand has to be deposited and further stayed amount Bank Guarantee has to be

submitted and accordingly the petitioner has complied with the condition of the stay order and has deposit the 50% demand and submitted the bank

guarantee. To the surprise of petitioner, the respondent No.3 issued orders levying interest on the amount deposited as per the condition of the stay

order by the Supreme Court inspite of the fact that the matter is sub judice and pending before the Supreme Court. The order by the respondent No.3

levying interest on amount deposited in pursuance to the orders of the High

Court and Supreme Court has been passed without issue of any notice to

the petitioner and without giving an opportunity of hearing and is contrary to the principles of natural justice and also contrary and in direct violation of

the order of the Supreme Court wherein the demand has been stayed till disposal of the SLPs. Accordingly, the petitioner filed a S.B. Civil Writ

Petition No.6635/2016 to challenge the impugned order dated 28.3.2016 and demand notice under Section 34A wherein the High Court while holding

that the term â??demandâ?? includes interest ordered the petitioner to pay the same.

3. Counsel for appellant relied upon Section 34A of Entry Tax Act, reproduced as under:

â??34A. Interest on failure to pay tax or other sum payable.â?

(1) Where a dealer or a person commits defaultin making the payment of any amount of tax leviable or payable or of any amount of tax, fee, interest

or penalty assessed or determined or of any amount or demand otherwise payable, within the specified time under the provisions of this Act or the

rules made or notifications issued thereunder, such dealer or person shall be liable to pay interest on such amount at such rate, not exceeding twenty

four percent per annum, as may be notified by the State Government from time to time, for the period starting from the day immediately succeeding

the date specified for such payment and ending with the day on which such payment is made.

(2) The liability to pay interest under theprovisions of this section shall also arise from a period which is less than a month.â??

4. In that view of the provisions, counsel for the appellant contended that during the pendency of writ, stay was granted by the Court, therefore,Â

interest cannot be calculated for which he has relied upon the decisions of the Supreme Court in:

1. Karnataka Rare Earth and Anr. vs. The Senior Geologist, Department of Mines and Geology and Anr, (2004) 2 SCC 783, wherein it has been

observed as under:

â??13. A penal statute or penal law is a law that defines an offence and prescribes its corresponding fine, penalty or punishment. (Blacks Law

Dictionary, Seventh Edition, p. 1421). Penalty is a liability composed as a punishment on the party committing the breach. The very use of the term 'penal' is suggestive of punishment and may also include any extraordinary liability to which the law subjects a wrong-doer in favour of the person

wronged, not limited to the damages suffered. (See, The Law Lexicon, P. Ramanatha Aiyar, Second Edition, p. 1431).

18. The two decisions relied on by the learned counsel for the appellants are not applicable to the facts of the present cases. Hindustan Steel (supra) is

a case under the Orissa Sales Tax Act, 1947. The appellant company was engaged in construction activity. During the course of such activity the

company supplied building materials to the contractor for construction and adjusted the value of the goods supplied at the rates specified in the tender.

The Court held such transaction of supply of building materials to be a sale and, therefore, the company a 'dealer' covered by the Act. However, the

persons incharge of the affairs of the company had not registered the company as dealer in the honest and genuine belief that the company was not a

dealer. The court held that the liability to pay penalty did not arise merely upon proof of default in registering as a dealer. An order imposing penalty

for failure to carry out the statutory obligation is the result of a quasicriminal proceeding and penalty will not ordinarily be imposed unless the party

obliged has either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its

obligation. Penalty will not also be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed the authority competent to

impose the penalty may refuse to impose penalty if the breach complained of was a technical or venial breach or flew from a bona fide though

mistaken belief. In Consolidated Coffee (supra), the court was dealing with Section 42(1) of Karnataka Agricultural Income Tax Act, 1957. A default

by assessee in making payment of tax attracted a penalty equivalent to one and a one-half percent of the tax remaining unpaid for the first three

months and two and one-half percent of such tax for each month subsequent thereto. There was also a provision for payment of interest on delayed

payment of tax. This Court held that interest is compensatory while penalty is penal, i.e. punishing in character. Where delay in payment of tax was

attributable to the order of stay passed by the Court, it was held that the order of stay placed the demand for the tax in abeyance and, therefore,

during the period of stay the assessee cannot be said to be in default and hence no penalty can be imposed on the assessee on the stay being vacated.

However, still the Court held that a late payment surcharge/interest is necessarily compensatory in character and a penalty is a punishment.â??

2. M/s. Consolidated Coffee Ltd. vs. The Agricultural Income Tax Officer, Madikeri & Ors., [2001] 248 ITR 417 (SC), wherein it has been observed

under:

â??7. As has been pointed out by this Court in Kanoria Chemicals and Industries Ltd. v. UP. State Electricity BoardÂ [1997]2SCR844Â an order

of stay may be made in different ways but the effect thereof is the same, namely, that for the period during which an order of stay operate, the order

that is stayed does not exist in the eye of the law. Once the stay is vacated, the order is resuscitated and may then be executed. For the period of stay,

therefore, the assessee cannot be said to be in default of the orders stayed and, therefore, no penalty in that behalf can be imposed. Consolidated

Coffee Ltd. vs. The Agricultural Income Tax Officer, Madikeri and Ors. (14.11.2000 â?" SC)â??

and also relied upon decision of Karnataka High Court in Yeshaswi Cashew vs. State of karnataka and Ors., [2001] 124 STC 465 (Kar), wherein it

has been observed as under:

â??10. It is seen from the language of Section 8 of the U.P. Sales Tax Act that the factum of non-payment of tax for whatever reason it be, gives

rise to the liability to pay interest in accordance with the said provision. There was no imposition of penalty under the said provision, as in the present

case. Moreover, the words ""default in making payment"" is not there in Section 8 of the U.P. Sales Tax Act. We would, therefore, prefer to follow the

latest decision of the Supreme Court which interpreted more or less an identical provision. Hence, the writ appeal is allowed to the extent of quashing

the impugned notice in so far as it demanded the payment of interest by way of penalty for the period during which the stay order was in force.

Accordingly the amount shall be re-calculated and a fresh demand notice should be issued to the appellant.â??

5. However, counsel for respondents has opposed the appeal and contended that in view of the observations made by the Supreme Court in Calcutta

Jute Manufacturing Co. and Anr. vs. Commercial Tax Officer and Ors, (1997) 6 SCC 262, wherein more particularly it has been observed as under:

16. The tax amount which they should havepaid as per Section 6-B remained

with the appellant during the entire period and they would have earned

good profit with that amount. The State, to which the tax amount should necessarily have gone, was not able to utilize it for public purposes. When

appellants had the advantage of keeping the amount of tax without paying it to the State exchequer only because the High Court granted orders

restraining the State from recovering that amount from the assessee, no act of the Court shall cause prejudice to any party. The pristine doctrine

couched in the maxim ""actus curiae neminem gravabit"" has ever remained a salutary and guiding principle.

17. The contention that as the Courts grantedinjunction restraining the State from recovering the tax amount as per Section 6B would raise a

presumption that the Court was then satisfied of the bona fides of the contention is too fragile for depriving the State of the statutory right of interest

incorporated in Section 10-A of the Act. Interim orders are passed by the High Court on a variety of considerations, one among being the strained

financial position of the person approaching the Court. Merely because the Court granted interim orders it cannot be inferred that Court was then

satisfied of a strong prima facie case for the appellants. On the contrary, it is well nigh settled that there is always a presumption in favour of

constitutionality of a legislative act. The presumption cannot be the other way round.â??

6. Learned Single Judge while considering the matter, has observed as under:

â?? The Apex Court has used the word tax/demand. The demand includes interest. Therefore, the petitioner is liable to pay the same, until contrary is

clarified by the Supreme Court.â??

7. In our considered opinion, demand was put in abeyance, therefore, interest cannot held to be accrued in view of the observations made by the

Supreme Court in two above referred judgments relied upon by the appellant. In the matter cited by counsel for respondents, constitutional validity was

challenged and interest was stayed. Therefore, Supreme Court while deciding the matter finally said that the interest is required to be paid.

8. In that view of the matter, we allow the appeal and the interest of the period during which stay was granted, cannot be allowed to be levied and

hence appeal deserves to be allowed.

9. If the interest is already recovered, the same may be refunded within two

weeks.

10. The appeal stands allowed.

